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CURRENT DEVELOPMENTS

The Referendum on Catalan Self-Determination (Part II)

Endemic Rhetoric, Interpretive Hypocrisy and Legal Imagination

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Constitutionalizing Secession in Canada and Britain: Setting a(n) (bad) example?

What encouraged the Catalans to place their bets on the persuasive power of remedial self-determination were two constitutional, not international legal texts: the Supreme Court of Canada's 1998 *Reference re Secession of Quebec*, and the 2013 Edinburgh Agreement between the British and the Scottish governments on the referendum of the independence of Scotland. Though neither offered support to the Catalan remedialist vision of self-determination—the *Secession Reference* empathetically rejects Quebecois' remedial self-determination, while the Edinburgh Agreement remains silent on the matter altogether—both offered a vision of a liberal-democratic constitutional order whose legitimacy in good part hinges on the way in which it addresses democratically manifested, minoritarian political aspirations. The *Secession Reference* expresses this spirit trenchantly:

> **The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada … The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.**

These statements are, of course, heavily qualified, and conditional. But even as such, taking them seriously requires a radical reinterpretation of two central implications of a still widely accepted image of a sovereign people as the author of a constitutional order: (1) that it is that same people, in virtue of that act, that retains the authority to reconstitute it either through a revolutionary exercise of its constituent power, or through a constitutionally-prescribed amendment procedure, and (2) that such change either: (a) may—under no circumstances— result in the violation of the (territorial) integrity of the people and its state; or, if it does (b) that such change occurs in conformity with the norms of the constitution, and not through the exercise of someone else's constituent power, or the right to self-determination.

Though there are some who argue that Spain must remain committed to option (2a), it is fair to say that even the most insistent opponents of Catalan secession would support option (2b). To follow the logic of the Canadian Supreme Court in the Catalan case, however, would not only entail the rejection of (2b) but would also compel the detractors of the Catalan independence to concede that:

(I) the Spanish constitutional order is under a duty to be responsive towards a majoritarian preference for secession among the citizens of Catalonia, established through the means of a referendum;

(II) the responsiveness—in this case—means that the organs of the Spanish state ought to (a) commence negotiations over the secession of Catalonia, (b) towards the secession of Catalonia, and—in the eventuality of their failure, (c) not obstruct the formation of an independent Catalan state (i.e. to facilitate the smooth transfer of authority within Catalonia, and to be constructive in the negotiations over succession of the debts, property, and international obligations of the Spanish state).

So, what the Catalans demand—obliquely, indirectly, and ambiguously—and what Spain likewise unequivocally rejects—is not the right to 'democratic management of public affairs' (as the preambular part of the Catalan Law on Self-Determination Referendum asserts) but the propositions (I), (IIa), (IIb) and (IIc).

In that regard, two points ought to be mentioned. The first one will be obvious to those who follow the trends in contemporary democratic theory, in that present-day democratic theorists don't simply ignore (I), (IIa-c). For the most part, they vehemently reject a connection between the ideals of responsiveness and the concept of democracy and democratic self-government. Similarly, the second point will also be taken as self-evident by most comparative constitutional scholars. Unlike Britain and Canada, however, Spain's constitution affirms the territorial integrity of the state and asserts its character as the indivisible homeland of all Spaniards. Neither the Act(s) of Union 1707 (Britain) nor the Constitution Acts 1867 and 1982 (Canada) contain anything resembling such a provision. What is more, the Canadian Supreme Court in the *Secession Reference* made very clear that any possible act of secession has to occur in conformity with (some) amending formula, specified in the Constitution Act 1982. Though the *Secession Reference* seems to require participants in the Confederation (i.e. the federal government, and the provinces) to—in principle—negotiate *towards* the secession of Quebec, Quebec is not entitled to expect that such negotiations end *favourably* for its project. Likewise—both the Scottish and the British governments seem to have agreed on the ad hoc character of the 2013 Edinburgh Agreement: mandated neither by the Act(s) of Union 1707, nor by an (implicit) superiority of the principle of popular, over that of parliamentary sovereignty. So,

from both the perspective of contemporary democratic theory and that of comparative law—and this is something which Catalan sovereigntists, secessionists, and nationalists prefer not to hear—Spain is right: there is nothing, either in currently prevailing conceptions of democracy or popular constitutionalism, which would justify the migration of the attitude with which the organs of the Canadian and the British constitutional order approached the prospective secessions of Quebec and Scotland.

Does this mean that Spain, in being right about that, is in possession of a superior moral and conceptual argument overall? Not at all. Rather than grounding it in a superior argument, Spain's refusal to show responsiveness to secessionist aspirations, those who authoritatively speak for Spain at the moment rely on ideals undistinguishable from those embraced by the Catalan secessionists themselves. It is the same commitment to constitutionalism, the rule of law, and democracy that define the ethics-political character of the antagonistic political projects of them both. Rather than being incomparable with the argument offered by the Catalans, the Spanish argument is their mirror image, and, predictably, just as problematic, both conceptually and ethically. On the one hand—though oft-invoked as an ethics-political trump card against Catalan demands for self-determination—the idea of the ultimate authority of the Spanish 'people' is as conceptually flimsy as the ultimate authority of the Catalan one: assertions of the latter conveniently neglects the fact that it is the 'people' of Catalonia that exists as a constitutional entity only in virtue of the relevant provisions of the Spanish constitution; asserting the former conveniently neglects the fact that the Spanish people itself exists in virtue of the willingness of a sufficient number of people to turn a blind eye to the performative contradiction necessary to imagine it *territorially*. On the other hand, to insist on the value of constitutionalism and the rule of law, as the Spanish do, as somehow prohibitive of a more accommodating attitude of the central state towards the secessionists aspirations, is equally disingenuous.

Though the logic of the *Secession Reference* is (against the claims of Catalan sovereigntists) neither straightforwardly, nor unambiguously applicable to Spain, it does stand as a reminder of one simple truth:

Where there is a will, there is a way. Put differently, irrespective of the available rhetorical covers—such as article 2 of the Spanish Constitution (self-righteously relied upon by the Spanish government in its allegedly principled indifference towards the Catalan aspirations for independence)—there is nothing that would stop the Spanish Constitutional Tribunal from reading into the Spanish constitution, if it wished to do so, a similar unwritten constitutional obligation of responsiveness, just as the Canadian Supreme Court did when it chose to 'discover' it in the history of Canadian constitutionalism. To claim that this somehow violates the presumably moral right of democratic self-government of the entire people of Spain conveniently forgets that both juridical creatures—not only the Catalan, but also the Spanish 'people'—stand on equally flimsy conceptual grounds, neither of which would ever be possible without selective memory: an amnesia about its juridical grounding in the text of the Spanish constitution, in the case of the former; and forgetting, *tout court*, about the absence of juridical origins, period, in the case of the latter.

Looking Beyond: The Catalan Referendum and Scholarship on Self-Determination

So here we are. Though Spain is no communist federation, and Mariano Rajoy is no Slobodan Milošević, Catalan secessionists ended up reaching for the same heavy rhetorical artillery that were once used by their Slovenian and Croatian 'colleagues': the assertion of the right to self-determination as a juridical (and not just moral), non-negotiable entitlement to exercise one's sovereignty *a la carte*. More than two and half decades after one of the most traumatic political breakups in the history of Europe, the political destiny of another multinational state is again being argued with the help of the same combustible vocabulary —invoked, as always, hypocritically, self-righteously, and single-mindedly. Having said this, I hasten to add that this short piece shouldn't be read as a denunciation of Catalan aspirations for independence. To the contrary: the time has come to turn one's gaze to other, less visible 'culprits': jurists and scholars, both international and constitutional, and their impoverished legal and political imaginations, which set the stage for a new dawn of a concept long thought to be among the living dead: on its death bed, dying, always

almost, but not quite.

Rather than succumbing to their first impulse to evaluate how (if at all) the constitutional crisis in Spain affects the doctrine of self-determination, or the migration of the language of clarity in international and comparative constitutional law, the scholars who'd be tempted to do so would perhaps do well to treat the coming independence referendum as an occasion to pause, look inward, and ask: Is there anything in the way in which we've continued to approach the vocabularies of self-determination, popular sovereignty, and constitutionalism over the last 20 years that has contributed to a situation (if only marginally) where nothing seems to have changed? To a situation, that is, where—irrespective of valiant attempts at discursive innovation on the Catalan side (e.g. 'dret a decidir') and irrespective of the commendable self-restraint (thus far) on behalf of the Spanish government in Madrid—the simmering conflict over territorial sovereignty reaches an all-too-familiar point: a stand-off between antagonists, now determined not to lose face, a potential turn for the worse, possibly with devastating consequences. Though this by no means suggests that the Catalan and the Spanish elites ought to be excused for putting themselves, and the citizens they represent, in this situation, it does suggest that it might be high time to talk about the general failure of juridical and scholarly imagination which provided those on the ground with little else than the same old hypocritical, selective, self-righteous, inflaming, and deceptive rhetoric seen on display on so many occasions before. More specifically, the scholars of both public international as well as comparative constitutional law should ask themselves the following three questions:

(1) What are the scholarly expectations, precisely, that drive their attempts to disseminate the *ideal of clarity* (of the referendum question and of the winning majority)—as the most important formal criterion of democratic legitimacy of sovereignty referenda? In Canada, Montenegro, and the United Kingdom, the formalistic vocabulary of clarity seems to have been effective in the sense that it has successfully replaced a more substantive, traditionally dominant, legitimizing vocabulary—that of the right to self-determination. Spain and Catalonia demonstrate the limits of that approach, which seems to

hinge on a simple expectation: *proceduralization + formalization = domestication of secession*; both literally (in the sense of rendering international law irrelevant) as well as metaphorically (in the sense of making secessionist contestation a gentler and more quotidian affair).

(2) What is the point of insisting—as many international legal scholars do—on the inapplicability of the right to 'external' self-determination in the context of secessionist crises in otherwise legitimate, democratic, and inclusive states—which Spain, irrespective of its shortcomings, most certainly is? To claim that, as do advocates of the remedial conception of that right, that the people vested with the right to self-determination is nothing but a *terminus technicus* of international law (not a real collective, but just the name that jurists use as a conceptual shorthand when they evaluate the conformity of sovereign states with their fiduciary duties)—or, as is the case with opponents of the 'remedial' conception, that the right to self-determination is just another way of referring to the patterns of constitutional government established in conformity with the principles of effectivity and non-intervention—is something which cannot be separated from its rhetorical implications. Linguists who work in the sub-field of pragmatics would probably call these conventional implicatures: parts of the utterances that are suggested even if not expressed or strictly implied.

Those implicatures exist, even if international jurists choose to ignore them (possibly thinking that their interpretations of the right to self-determination will never actually be overheard by those on the ground). Once we allow for that possibility, however, it quickly becomes apparent just how disturbing the implicatures of those interpretations may be. What the proponents of remedial self-determination imply, for example, cannot but amount to the following advice: If you want to establish a new state in conformity with the norms of international law, first make sure to be sufficiently oppressed and discriminated against by your parent state. What opponents of this interpretation suggest is not much better, either: Make sure that the sacrifice of life and livelihood you are about to make (your own, and that of your opponent) is not in vain—that you win in the 'trial by ordeal' implicitly prescribed by the norms of international law (on the

anti-remedial conception of the right to self-determination). The coming months will tell if Catalans are willing to go that far. What is certain, however—and this brings us to the final, third point—is that even more innovative juridical interpretations of the right to self-determination—such as those which assert the existence of an alleged 'right to be taken seriously'—are sentenced to a destiny of not being taken seriously without offering an explicit answer to the following question:

(3) Is institutional responsiveness an ideal of democratic, constitutional government? If not, why not? If yes, what is its status? Is it a supra-constitutional principle, informing the architecture of all democratic constitutional orders? Or, is its applicability exhausted in positive constitutional law; in whatever democratic arrangements a particular constitutional order happens to entrench? The latter, for example, is the position of the Spanish government. To those who critique its adamant refusal to take the Catalan aspirations seriously, they offer a response — to which, thus, far, there is no satisfactory theoretical comeback: But, we are taking them seriously, just as the established rules of constitutional contestation intended it! If constitutional responsiveness—*not* democracy, *not* self-government, *not* popular sovereignty, *not* self-determination—is intended to mean more than that, than *that* must be stated explicitly, and argued for comprehensively. Doing so will require us to confront the anxieties which have pushed us to invent the imaginative devices of 'peoples', 'sovereignties', and self-determination 'rights' in the first place. It is highly doubtful if this is something that the strategists of Catalan sovereignty took into consideration when they placed their bets on the rhetorical power of the international legal right to self-determination. In fact, in alleging that the refusal of the (otherwise unimpeachably democratic) Spanish constitutional order to be responsive towards their secessionists aspirations constitutes the reason to apply the 'remedy' of external self-determination, Catalan secessionists seem to have started from the assumption that the moral, political, and institutional appeal of the ideal of responsiveness thus understood, is obvious—or at least intuitive—not dubious, and debatable.

The only thing left is to hope that the cost of this bet is not paid in the

lives and livelihoods of ordinary Spaniards and Catalans. One thing is certain: if the events after October 1 truly take a turn for the worse, fingers should not be pointed solely towards Barcelona or Madrid. Scholars who'd be tempted to do so would do better to put them on their foreheads first, and ask themselves a simple question already mentioned above: Could it be that the discursive 'fail' of the right to self-determination (also) has something to do with the style of scholarly engagement with the subject, which across disciplinary divides, which—irrespective of its increasing sophistication and self-awareness over the last 20 years—never really contended with it with an eye on the conceptual and moral imagination of those on the ground? Needless to say, it is highly questionable whether partisans of secession or its scholars will ever be able to escape what, in light of the recent resurgence of self-determination rhetoric, appears to be a veritable *Groundhog Day* of constitutional imagination: the eternal return of a discursive pattern in which the undeterred and the committed, half-aware of their own hypocrisy, end up reaching for the most volatile rhetorical compounds, only to provoke further outrage by those—equally indifferent to their own double standards—see themselves as being taken for a ride. Even if that's the case—or perhaps, precisely because of it—let the Catalan referendum at least be a reminder of this predicament, not just another opportunity to apply professional competences in ways that keep the business of legal and theoretical scholarship as usual: thriving on the resentments, hopes, and anxieties of those on the ground; indifferent to the possibility of encouraging them to give a chance to new vocabularies that might mediate their deeply-felt aspirations differently.

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